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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DENNIS CHANG,

Plaintiff and Respondent,

v.

HENRY WEI,

Defendant and Appellant.

B192902

(Los Angeles County
Super. Ct. No. BC343465)

APPEAL from a judgment of the Superior Court of Los Angeles County. David L. Minning, Judge. Affirmed.

Law Offices of Ricky W. Poon, Ricky W. Poon for Defendant and Appellant.

Law Offices of Lawrence M. Markey, Jr., Lawrence M. Markey, Jr. for Plaintiff and Respondent.

The owner of real property appeals from a default judgment entered against him in an action for specific performance of an agreement for the sale of a single family residence. He appeals from the default judgment and from the court's denial of his ex parte request to shorten time for a hearing on his motion to quash/motion to vacate the judgment based on lack of personal jurisdiction. He also contends the trial court erred in denying his motion to quash/motion to vacate without a hearing. We affirm.

FACTS AND PROCEEDINGS BELOW

Appellant Henry Wei is the owner of record of a single family dwelling located on Emery Street in El Monte. He is a resident of the Dominican Republic or Taiwan, China. Wei leased the residence to a series of renters over the years.

In August 2003 Wei agreed to sell the real property to respondent Dennis Chang for \$218,000. The transaction was never consummated. In June 2004 Chang filed an action against Wei for specific performance of the real estate contract, among other claims. Wei cross-complained for unjust enrichment, rescission, trespass and conversion.

The matter came to trial on September 9, 2005. After delivering opening statements the parties requested a recess to discuss settlement. During the recess the parties reached a settlement. With the assistance of counsel and a Chinese interpreter the parties recited the terms of their agreement in open court for the record. The parties agreed to complete the real estate transaction at a compromised price of \$300,000. The parties executed a new purchase and sales agreement and specified escrow would be completed within 45 days. The parties agreed to dismiss the current case with prejudice. They also agreed to dismiss two other pending cases involving the same parties and other defendants. Finally, the parties agreed to execute mutual releases of all defendants and cross-defendants, with the exception being a claim Chang had against Wei's attorney in the matter and his current attorney, Ricky W. Poon. The parties informed the court they agreed the settlement would be "enforceable under 664.6 of the Code of Civil Procedure.

And the parties would expressly agree that even in the case of a dismissal that the court would retain jurisdiction to enforce the settlement.”¹

Escrow opened and Chang deposited \$7,000 in escrow as specified in the agreement. Escrow was to close in late October 2005, but did not. Each side faulted the other for alleged failures to satisfy conditions or proposed conditions. Wei had agreed to a short extension of time the lending company had requested to close escrow. Wei, however, apparently imposed numerous conditions on his approval to the extension to which Chang did not agree. When Chang’s loan funded a few days beyond the extended date, Wei refused to proceed with the sale.

On November 22, 2005 Chang brought suit against Wei for specific performance of the settlement agreement the parties agreed to in open court on September 9, 2005.

Chang recorded a “Notice of Pendency of Action” against the property on November 29, 2005. Chang’s counsel filed a declaration stating Chang did not know and could not locate Wei’s current address. On the purchase and sales agreement Wei had left the address portion of the contract blank. Chang’s counsel filed a declaration stating he had performed a “reasonably diligent” search to obtain Wei’s current address. Specifically, Chang’s counsel conducted an internet search for public information connecting Wei to the property on Emery Street. On November 16, 2005 Fidelity National Title Company sent a facsimile transmission to Chang’s counsel of a Los Angeles County property record effective July 1, 2005. The report indicated Wei was the owner of record of the residence on Emery Street in El Monte. The report provided a mailing address for Wei of 324 S. Diamond Bar Boulevard, #201, Diamond Bar, California 91765. This apparently was the address used by the Los Angeles County Tax Assessor’s office to mail Wei property tax statements for the property at issue in this case.²

¹ The record does not make clear what steps, if any, the parties took to ensure the court’s continuing jurisdiction.

² Chang performed a second search of public records in July 2006 and information provided by the Los Angeles County Assessor’s Office indicated the Diamond Bar

Chang hired a process server to serve Wei at the Diamond Bar address. Between December 28, 2005 and January 3, 2006 the process server made four attempts to personally serve Wei at the location, to no avail. The Diamond Bar address is apparently a commercial enterprise which provides, among other services, private mail boxes. On the process server's fourth attempt the process server served a Mr. Frank Lew with the summons and complaint and notice of lis pendens. According to the process server's declaration, Mr. Lew identified himself as the person in charge of the facility, authorized to accept service on Wei's behalf.

Thereafter, Chang mailed copies of the summons and complaint to Wei at the Diamond Bar address. Chang also sent copies of the summons, complaint and notice of lis pendens to former counsel Domino Wang and current counsel Ricky W. Poon with a cover letter requesting counsel to consult with Wei to confirm their authority to accept service on his behalf. Chang filed his declaration of diligence and proof of substitute service with the court in January 2006.

Wei did not respond and on March 20, 2006 Chang filed a request for entry of default. The request for entry of default was mailed to Wei at the Diamond Bar address. In June 2006 the court entered default judgment against Wei. Chang prepared a conditional judgment for specific performance which the court signed and entered on July 12, 2006.

On July 11, 2006 Wei, though his counsel Ricky W. Poon, specially appeared to challenge the court's jurisdiction. He filed a motion to quash service of the summons and complaint and to vacate the default and default judgment for lack of personal jurisdiction. In his motion, Wei argued he had not been in California or the United States since January 2006 and he had not been served with notice of the proceedings in either the Dominican Republic or Taiwan, China. Wei did not provide his current residence

address was still Wei's mailing and billing address for property tax statements for this property.

address in either the Dominican Republic or Taiwan. Wei's motion was scheduled to be heard on August 14, 2006.

Chang mailed notice of entry of judgment on July 27, 2006. On July 31, 2006 Wei moved ex parte for an order shortening time to hear his motion to quash/motion to vacate the default judgment and for a stay of the judgment. Wei filed a declaration in support of his request to shorten time stating he had not been in California or the United States since Chang filed his complaint in November 2005, he had not been served with the summons and complaint, the judgment taken against him was void for lack of personal jurisdiction, and he was at risk of losing his property without due process of law unless the court immediately stayed execution of the judgment.

At the hearing on July 31, 2006 Chang opposed Wei's motion to shorten time, pointing out Wei's motion to quash was scheduled to be heard in just a few weeks and, in any event, lacked merit. The court informed Wei it could not resolve complex issues of jurisdiction on an ex parte motion. Because the matter was already set for a full hearing the court denied Wei's request to shorten time and for a stay.

On the same date, July 31, 2006, Wei filed a notice of appeal from the default judgment and from the court's denial of his ex parte request to shorten time to hear his motion to quash and/or for a stay of the judgment.

In the meantime Chang filed opposition to Wei's motion to quash, including declarations of counsel explaining the due diligence he undertook to discover Wei's address. Wei filed a reply and included a declaration from Wei stating he did not own the facility in Diamond Bar, did not conduct business at the Diamond Bar address, had never rented a mail box at the commercial mail box facility at the Diamond Bar address, and counsel's representation terminated at the conclusion of the prior matters and they were not authorized to accept service on his behalf.

At the scheduled hearing on August 14, 2006 the court learned Wei had already filed a notice of appeal from the judgment. The court thus denied his motion to quash/vacate the judgment on the ground Wei's filing of a notice of appeal deprived the court of jurisdiction to hear his motion.

DISCUSSION

Wei argues because he was never served with the summons and complaint the trial court lacked jurisdiction to enter the default judgment against him. Wei stresses no court has yet ruled on the merits of his motion to quash/motion to vacate the judgment for lack of personal jurisdiction. In his appendix and briefs on appeal Wei provides materials and argument concerning service of process in this case and requests this court to review the merits of his motion to quash and, in so doing, to vacate the default judgment as void for lack of jurisdiction.³

It is not possible to do as Wei requests. “Fundamentally, unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error.”⁴ Courts of appeal will not usurp the fact-finding function of the trial court.⁵

More importantly, this court’s appellate jurisdiction extends only to those orders or judgments specifically identified in the notice of appeal.⁶ Wei’s July 31, 2006 notice of appeal refers only to the default judgment and the court’s July 31, 2006 order denying his request to shorten time and/or to stay the proceedings. Accordingly, this court is

³ We note the trial court was prepared to and would have ruled on his motion to quash/vacate the judgment but for Wei’s counsel’s actions. The filing of a notice of appeal vests jurisdiction in the appellate court and for most matters terminates the trial court’s jurisdiction. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666; see also, *Copley v. Copley* (1981) 126 Cal.App.3d 248, 298 [“During the pendency of an appeal, the trial court is without power to hear a motion to vacate judgment from which an appeal has been taken.”].) Wei might have avoided this result by withdrawing his notice of appeal.

⁴ *Uriate v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791, quoting Eisenberg et al., Cal. Practice Guide (The Rutter Group 1985) Civil Appeals and Writs, paragraph 1:12, page 1-2 rev. #1, 1995.

⁵ *In re Zeth S.* (2003) 31 Cal.4th 396, 404 [“an essential distinction between the trial and the appellate court [is] that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law.”]; see also, *Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813.

⁶ California Rules of Court, rule 8.100 (a)(2).

“without jurisdiction to review” any “other matters” occurring after Wei filed his July 31, 2006 notice of appeal.⁷ Post-judgment orders are reviewable by filing a notice of appeal if the post-judgment order is separately appealable,⁸ or where appropriate, by requesting extraordinary relief.⁹

It is immaterial Wei included documents concerning service of process and other matters in his appendix on appeal which were filed after entry of the default judgment or after Wei filed his notice of appeal. “As a general rule, documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.] Likewise disregarded are statements in briefs based on matter improperly included in the record on appeal. [Citations.]”¹⁰ As noted, the function of an appellate court is to review the action of the trial court in rendering the judgment, or in making the order from which an appeal is taken.¹¹ For this reason, “[i]t is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court’s judgment, *an appellate court will consider only matters which were part of the record at the time the judgment was entered. (People’s Home Sav. Bank v. Sadler [(1905) 1 Cal.App. 189].)* This rule preserves an orderly system of

⁷ *In re McManus’s Estate* (1963) 214 Cal.App.2d 390, 394 footnote 1; see also, *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46-47 [notice of appeal filed May 26 specifying only the May 5 judgment did not perfect appeal of the May 9 order denying the motion to tax costs].

⁸ See Code of Civil Procedure section 904.1, subdivision (a)(1) and (2).

⁹ For example, the denial on the merits of a motion to quash is reviewable by writ of mandate. (See, e.g., *Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 905 [“A petition for writ of mandate is the appropriate method to challenge an order denying a motion to quash service of summons for lack of personal jurisdiction.”]).

¹⁰ *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632; see also, *Doers v. Golden Gate Bridge, etc. Dist.* (1979) 23 Cal.3d 180, 185 footnote 1 [“As a general rule, documents not before the trial court cannot be included as a part of the record on appeal. [Citation.]”].

¹¹ *People’s Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193.

appellate procedure by preventing litigants from circumventing the normal sequence of litigation. . . . ”¹²

The trial court entered the default judgment on June 27, 2006. The record at that time contained evidence of the parties’ settlement agreement and a copy of the parties’ purchase and sales agreement based on this settlement agreement, in addition to Chang’s complaint for specific performance. Also before the court was Chang’s counsel’s declaration Wei’s current address was unknown and a proof of service stating a process server had served the summons, complaint and a copy of the *lis pendens* on Wei by substituted service on the person in charge of his usual place of business.¹³ The filing of the proof of service created a rebuttable presumption service was proper.¹⁴ Because there was no apparent invalidity on the face of the proof of service, and no challenge to the validity of this mode of service on Wei at that time, the trial court properly entered the default judgment as requested.

Wei’s notice of appeal also cites the court’s July 31, 2006 denial of his *ex parte* request to shorten time to hear his motion to quash and/or for a stay of enforcement of the judgment. Referring to these orders in the notice of appeal was ineffective to confer jurisdiction on this court. They are purported appeals from nonappealable orders.¹⁵

¹² *Reserve Insurance Co. v. Pisciotto*, *supra*, 30 Cal.3d 800, 813, italics added.

¹³ See, e.g., *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 545-547 [Code of Civil Procedure section 415.20, subdivision (b) authorizes substituted service on a private/commercial post office box when there is no alternative, or more effective, means to effect service].

¹⁴ Compare, *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441, 1442 [“the proofs of service failed to comply with the minimum statutory requirements and no presumption of proper service ever arose.”].

¹⁵ See Code of Civil Procedure section 904.1 for judgments and orders from which appeals may be taken. See also Code of Civil Procedure section 917.4 which specifies a party must post an undertaking in the amount specified by the court in order to stay a judgment directing the “sale, conveyance or delivery of possession of real property.”

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

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JOHNSON, Acting P. J.

We concur:

WOODS, J.

ZELON, J.